97

(2)

Supreme Court, U.S.
FILED

No. _____ 08-49 JUN 25 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

CHRISTIAN ERIK WILLIAMS,

Plaintiff-Appellant-Petitioner, Pro Se,

v.

JPMORGAN CHASE BANK, RAYMOND KONG, STEVE RUTTER, PETER BIBB, GARY FORD, AND ANTHONY SHEFFERD,

Defendants-Appellees-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit, U.S.C.A. 06-1324 (cv), S.D.N.Y. 02-cv-4250

SUPPLEMENTAL APPENDIX

CHRISTIAN ERIK WILLIAMS, Pro Se
268 Barrow Street, Apt. Grdn
Jersey City, NJ 07302-4026
Tel: 201-324-0869
Fax: 775-242-4940
Email: xtianNYC@gmail.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTIAN WILLIAMS, Plaintiff, -against- J.P. MORGAN CHASE BANK, RAYMOND KONG, ANDREW HOLLY, STEVE RUTTER, PETER BIBB, GARY FORD, ANTHONY SHEFFERD, Defendants.	:	**REPORT & RECOMMENDATION** 02 Civ. 4250 (GBD) (MHD)

TO THE HONORABLE GEORGE B. DANIELS, U.S.D.J.:

Plaintiff Christian Williams has sued his former employer, JPMorgan Chase Bank ("JPMorgan" or "the bank"),[1] as well as his former supervisor, Raymond Kong, and other bank employees, asserting that he was discriminated against and eventually terminated on the basis of sexual orientation and the mistaken perception that he was HIV-positive ("HIV+") and therefore disabled, in violation of the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.* and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin.

[1] Williams sued JPMorgan Chase Bank as "J.P. Morgan Chase Bank."

Code, § 8-107. Williams also claims that the defendants subjected him to a hostile work environment and retaliated against him for complaining about Kong's treatment of him to upper-level management and the Human Resources department. In addition to his state and city human rights law claims, Williams alleges additional state common-law claims of negligent and intentional infliction of emotional distress, libel, slander, and defamation of character.

Initially represented by counsel, Williams first brought his action in May 2002 in New York State Supreme Court against the bank and Kong. In June 2002, on the basis of diversity jurisdiction, the defendants removed Williams's action to federal court. Williams, then proceeding *pro se*, filed two amended complaints.[2] Following completion of discovery, the

---

[2] In January 2003, Williams filed his First Amended Verified Complaint, which named the bank and twelve individual defendants. (*See* Affidavit of Stacey L. Blecher, sworn to Apr. 6, 2004 at ¶ 5). The defendants moved to dismiss Williams's Occupational Safety & Health Act claims, and remand the action to state court, on the basis that diversity jurisdiction no longer existed. (*Id.* at 6). Williams agreed to drop four defendants in order to restore complete diversity. (*Id.* at ¶ 7). In an order entered on March 17, 2003, the district court dismissed plaintiff's OSHA claims and allowed him leave to file a second amended complaint (*id.* at ¶ 8 & Ex. C), which Williams filed on March 22, 2003. (*Id.* at ¶ 9). He named as defendants JPMorgan Chase Bank, Raymond Kong, Andrew Holly, Steve Rutter, Peter Bibb, Gary Ford, and Anthony Shefferd. Williams subsequently informed the court that he wished to remove Holley as a defendant. (*See* June 17, 2004 letter to the court from Christian E. Williams). In an R&R filed June 28, 2004, we recommended that

(Continued on following page)

defendants have moved for summary judgment, arguing that plaintiff's claims fail as a matter of law because Williams cannot establish that he was subjected to disparate treatment or retaliation based upon his sexual orientation or alleged perceived disability; that he was terminated as a result of a post-merger reorganization and reduction in force; and that he has provided no evidence that defendants' stated reasons for their adverse actions are a pretext for sexual-orientation or perceived-disability discrimination or retaliation.[3]

For the reasons that follow, we agree with defendants and recommend that their motion be granted.

BACKGROUND

Williams earned a degree in Computer Studies from Northwestern University in June 1985. (*See* Second Amended Complaint ("Compl.") at ¶ 22; CW

---

the district court enter an order dismissing the complaint against Holley, a recommendation that the district court adopted in an order filed July 12, 2004.

[3] In May 2005, plaintiff filed a petition for a writ of mandamus with the United States Court of Appeals for the Second Circuit, seeking an order from the appeals court directing the district court to rule on defendants' motion for summary judgment. In an order filed May 19, 2005, the Second Circuit denied Williams's petition without prejudice to renewal if the district court failed to take action on the motion within 90 days. The mandate from the Second Circuit issued on May 20, 2005. (*See In re Christian Williams,* 05-0438-op (2d Cir. May 19, 2005)).

Ex. E[4] (Resume)). He worked for Salomon, Inc. and then, in July 1995 accepted an offer from Chase Manhattan Bank as a full-time Information Specialist in the Trading Operations & Systems Department. (*Id.* at ¶¶ 22, 23). During his employment with the bank, his responsibilities included design, development, and enhancement of financial securities trading systems. (*Id.* at ¶ 22). He worked for Chase (and its successor JPMorgan) until June 28, 2001. (Tr. #1: 15).[5] From the end of summer 1998 until his termination in June 2001, Williams reported directly to defendant Raymond Kong. (Tr. #1: 112, 113, 137, 139).

Williams describes himself as a "homosexual male who was 'out of the closet' in the workplace" and notes that his domestic partner was listed on his benefits card. (Compl. ¶ 21; CW Ex. H). He also asserts that, during his employment with the bank, he "did not hide nor deny his sexual orientation," and many of his supervisors and colleagues knew that he was gay. (Compl. ¶ 24; Tr. #1: 126; Tr. #2: 146-49). For example, in Spring 1997 and 1998, Williams

---

[4] Exhibits identified as CW Ex. ___ may be found in plaintiff's Exhibits Binder (binder number two) which he submitted in opposition to defendants' summary judgment motion.

[5] Williams's deposition was taken over the course of three days, on June 17, 19, and 27, 2003. For ease of reference, citations to plaintiff's June 17, 2003 deposition testimony are referred to as Tr. #1 because the transcript for the June 19 proceeding erroneously begins again on page "1." Therefore, citations to Williams's testimony taken on June 19 and 27 are referred to as Tr. #2.

forwarded an e-mail to his colleagues at the bank seeking sponsorship for the Gay Men's Health Crisis annual AIDS Walk (Compl. ¶¶ 25, 41; CW Ex. G), he was included on the "out" e-mail list for JPMorgan Chase Pride (Compl. ¶ 24), and he introduced his then-boyfriend to several co-workers in 1996 or 1997. (Compl. ¶ 37). He was not, however, HIV+. (Tr. #1: 131).

In December 1995, Williams began working on the Leave Order Processing System ("LOPS") team. (Compl. ¶¶ 26, 28). In his 1995 job evaluation, Williams's manager rated his job performance as a "2" on a scale of 1-5, or "commendable." (Compl. ¶¶ 35, 36; CW Ex. J). Williams received a mixture of commendable and good ratings in the core job skills and responsibilities categories listed in the evaluation. (*Id.*). By the fall of 1996, the bank promoted him to Technology Officer. (Compl. ¶ 34, Tr. #1: 88-89). Williams's then-supervisor, Tom San Pietro, rated his 1996 overall job performance as a "2" in that year's job evaluation. (Compl. ¶ 35; CW Ex. L). San Pietro wrote that Williams was "a valuable member of the team," had done "a superior job of production support," and had utilized his skills in developing a new system on a very tight schedule. (*Id.*). San Pietro also noted that, with the promotion, Williams would be held to a higher performance standard. He commented that Williams had "a tendency to be unnecessarily critical of some workers," and that he had to give Williams "a little push to get a job completed

thoroughly," which he did not expect to have to do "with someone in an officer position." (*Id.*).

In August 1997, San Pietro left the bank and Williams began reporting to Shabeena Gilani, the LOPS team manager. Gilani in turn reported to Raymond Kong. (Compl. ¶ 38; Tr. #1: 15, 39, 40). Williams did not report directly to Kong until the end of summer, 1998. (Tr. #1: 113). Williams charges that Kong was the apotheosis of the "workplace bully," who fostered a hostile work environment and harassed and discriminated against him on the basis of his sexual orientation and perceived HIV+ status. He claims that this constant harassment caused him permanent psychiatric injury and culminated in his wrongful discharge. (Compl. ¶¶ 48-53, 56, 86-87, 99-106, 171-73). He further claims that the bank inadequately responded to his complaints concerning Kong and thereby aided and abetted Kong in fostering a hostile work environment (Compl. ¶¶ 55, 83-84, 90-96, 113, 121), and that the other individual defendants "never did anything to solve the problem. I was never moved and put on to another team. They didn't seem to discipline Raymond Kong in any way. I don't think they took any of my allegations seriously." (Tr. #2: 188-89). In his view, Human Resources was "impotent" and "upper management didn't care" about his grievances. (Tr. #2: 11-12). Nevertheless he asserted that none of the individual defendants, other than Kong, discriminated against him directly; in his view, they all aided and abetted Kong. (Tr. #2: 158).

During his deposition, Williams repeatedly expressed a low opinion of Kong's management style. He stated, "Kong had his own agenda: gaining power, doing the things that he wanted to do and facilitating doing the things that he wanted to do." (Tr. #1: 144). He described Kong as "generally belligerent and disrespectful. He talked down to everybody. He was a technology authoritarian. By that, I mean that it didn't matter what ideas on how to do things were floating around out there. The only idea that mattered was his idea, and that was the one that was going to occur." (Tr. #1: 99-100). Williams further offered, "[I]f you weren't totally subservient to this guy, you were shit." (Tr. #1: 42), and faulted Kong for being "dishonest," "highly manipulative," a liar and a "crappy manager." (Tr. #1: 100-02). Williams opined that Kong favored Asian employees over white employees. (Tr. #2: 145).

Williams also described Kong's negative treatment of him personally. He stated that Kong "just plain didn't like me at all." (Tr. #1: 147). Although he acknowledged that Kong, as a manager, was "generally bad to everybody," he remarked that there was a qualitative difference in how Kong treated him, which he attributed to the fact that he was gay. (Tr. #1: 124-25; Tr. #2: 145, 233), Williams testified "To me he was Satan, Lucifer, rolled into one incarnate as my manager out to get me with a smile on his face trying to look angelic to his superiors." (Tr. #2: 33). Put another way, when asked whether Kong was abusive toward other employees, Williams retorted, "Again, that is

like asking me, you know, who else was Hitler abusive to. I think he was abusive at times to everyone, but I think I had a special place in his dark heart, for lack of a better phrase." (Tr. #2: 183).

Williams points to two statements made by Kong as exhibiting his anti-gay bias. Kong made the first statement in the fall of 1997, a time when Williams was not reporting to Kong (Tr. #2: 181); according to plaintiff, Kong referred to Williams as "Christine" while working on a seating chart for the office. (Compl. ¶ 42; Tr.#2: 138-39). According to Williams, he admonished Kong for the comment, which he considered "to be both a gay slur and a sexual harassing comment implying that plaintiff was a girl." (Compl. ¶ 42). Williams stated that Kong's "pattern of malice" toward him started with this "off hand comment" and grew into his "systematic exclusion" at the workplace. (Tr. #2: 137). He charged that Kong gave him "less desirable work" and "lesser tasks" and he had to "jump through technology hoops" that were required of no one else on the team. (Tr. #2: 44, 137).

He contended that Kong discredited him and belittled his work in front of his teammates (Compl. ¶ 139(e)); made unreasonable demands upon him (Compl. ¶ 139(g)); insulted him (Compl. ¶ 139(l)); discounted his accomplishments (Compl. ¶ 139(m)); excluded him from meetings (Tr. #2: 44); and did not give him a raise. (Tr. #2: 44). For example, he complained that Kong "systematically cut[ ] me out of the LOPS rewrite . . . when I'm the one who is on the team, who knows LOPS the best, been there the

longest, I know the database code in and out, I know the C++ code in and out, I know the servers in and out. To cut me out of the redesign process is asinine." (Tr. #1: 146-47). Williams claimed that Kong treated him differently on the job due to his bias against Williams's sexual preference, not because of his job performance, and that Kong's goal was to "drive [him] off the team." (Tr. #1: 128-29; Tr. #2: 137-38). Williams arrived at this conclusion even though he had never had a conversation with Kong about his sexual orientation, had never heard Kong refer to his sexual orientation when talking with anyone else, and had never referred to Williams's domestic partner in a derogatory manner. (Tr. #1: 127-28).

The second comment that Williams regarded as revealing Kong's anti-gay bias occurred on an unspecified date when Kong rejected some of Williams's recommendations and an argument apparently ensued. (Tr. #2: 29-31). According to Williams, Kong stated, "Arguing with you is like arguing with my wife." (Compl. ¶ 110). Williams felt that Kong was insinuating that he was a girl, and characterized the comment as a "very condescending, rude thing to say." (Tr. #2: 27). During his deposition, however, Williams testified that one of his female colleagues told him that Kong had made the same comment to her (Tr. #2: 26-27), and that she felt Kong was "anti-Semitic and anti-black and anti-gay. He is anti-everything just about." (Tr. #2: 32).

When plaintiff was asked the basis of his claim that Kong had discriminated against him based upon

his perceived HIV+ status, Williams related a story involving a former bank employee, Robert Fisch, who told Kong sometime in 1996 that he was HIV+. (Compl. ¶¶ 66-67; Tr #2: 42; CW Ex. I). According to Williams, Fisch made that revelation to Kong "because he had to leave early every Thursday to go see his [AIDS] doctor." (Tr. #1: 126). Williams, who was experiencing thyroid and weight issues, also made weekly or bimonthly visits to a doctor, although he never told Kong the reason for his doctor visits. (Tr. #1: 126; Tr. #2: 39, 40, 136; Compl. ¶ 71). Williams speculates that Kong erroneously lumped him and Fisch together, as gay males, deducing that if Fisch was HIV+ and saw a doctor every week, then the reason why Williams was also seeing a doctor every week was because Williams was HIV+ as well. (Tr. #1: 126, 128). "So what Raymond saw, is, well, if closeted Bob Fisch is going every week to see his AIDS doctor, and out Christian is going every week to every other week to see his doctor, he must be HIV positive, too, and that's a conclusion that I firmly believe basically." (Tr. #1: 126).

Williams attached Fisch's affidavit – which he stated that he had written with Fisch – as an exhibit to his complaint. (Tr. #2: 42). In that affidavit, Fisch averred that Kong, his supervisor, was "regularly demeaning, belligerent and hostile" toward him, and that Kong was the reason he had sought employment elsewhere. (CW Ex. I at ¶¶ 8, 13, 14). Fisch also expressed his view that "I have no doubt that Mr. Raymond Kong hated me, possibly because I was gay

or because of my HIV status. I do not know the reasons for Raymond Kong's behavior toward me . . . Mr. Christian Williams or anyone else. It is possible that he discriminated against me because I'm gay." (*Id.* at ¶¶ 16-17). In response to a question at the deposition whether Fisch had ever complained to anyone at the bank that he was being discriminated against, Williams responded in the negative, adding, "People who discriminate just don't call you fag or you know, whatever, anymore. That's not the way they do things. Okay. They use other methods." (Tr. #1: 129)

When asked the basis of his belief that Kong had changed the terms and conditions of his employment based upon the perception that he was HIV positive, Williams responded, "He went though a pattern of malice designed to first initially push me out, [then] get me out when pushing me out did not work. Somewhere along the line, he decided for whatever reason, he didn't want me off his team, he wanted me out of the Bank." (Tr. #2: 195).

Williams never complained to anyone at the bank that Kong discriminated against him based on his perceived HIV+ status. (Tr. #1: 131-32). He explained that he did not arrive at this "after the fact" conclusion until he had left the Bank, at which time he learned that Fisch had told Kong that he was HIV+. (Tr. #1: 132). He then inferred that Kong had discriminated against him on the basis of perceived disability.

In January 1998, Gilani completed Williams's 1997 performance appraisal, and rated his overall performance a "3" or "at target" (*i.e.*, lower than his 1996 "2" rating). (CW Ex. M). While Gilani indicated that Williams "continued to do an excellent job of supporting production," she also observed that he "took too much time to complete his assignments." (*Id.*) Gilani wrote that "[t]here were many instances when it was necessary to keep Christian focused on his work and to give him a little push to complete the task"; "[h]e needs to develop a sense of urgency to get the job done"; and he "needs to improve his time-management skills." (*Id.*). She also commented that his suggestions tended to be more ideal and that he should "consider solutions that are practical" and think through "the consequences of his recommendations." (*Id.*). During his deposition, Williams disagreed with these negative assessments, and speculated that Kong had had input into the evaluation or had influenced Gilani to include them, thereby adversely affecting his rating. (Compl. ¶ 39; Tr. #1: 103-08; Tr. #1: 54-57).

Sometime in 1998, Williams met with Gayle Prescod in the bank's Human Resources department. He told Prescod that he was concerned with how Kong had treated Fisch and observed that Kong was treating him "in the same bad way if not worse." (Compl. ¶ 119). In response to Prescod's question whether Williams felt Kong was "anti-gay," Williams stated, "I don't know, but it is a concern of mine." (Compl. ¶¶ 68, 90, 119; Tr. #1: 117; Tr. #2: 92).

Approximately a year later, Williams complained to Prescod again, this time about Kong's "manipulative behavior" as well as his "unfair reviews, lack of raises and lack of bonuses." (Compl. ¶ 119). Prescod responded in the negative to Williams's inquiry whether he could be independently evaluated without Kong taking part in the review. (Compl. ¶ 119; Tr. #1: 121).

By January 1999, Kong had become Williams's direct manager. He was therefore the person who completed Williams's 1998 performance appraisal. (CW Ex. N). While Kong rated him "3" – "at target" – overall, he rated him "below target" in the area of "respect for others" and included numerous negative comments in the competency assessment section. On the one hand, Kong observed that Williams had "all the necessary technical skill and business knowledge to perform the job assigned," and was "sensitive to the need of some individual users." (*Id.*). On the other, Kong wrote that Williams's overall performance "varie[d] a lot" over the course of the year and criticized him in four areas:

(1) "Office hour punctuality." Kong indicated that Williams did not have a consistent arrival time at the office, which frustrated his teammates. Kong noted that Williams's work hours had been changed from 10:00 a.m. to 6:00 p.m. but that shift had not helped him arrive on time.

(2) "Personal life affecting work." Kong found that Williams's use of office time for personal activities

(such as buying his new home) negatively affected his job performance and the team's progress.

(3) "Unwilling to accept instruction and direction from superiors." Kong observed that Williams had "a strong feeling about what is right for the user community," and when his and the bank's directions were the same, he contributed greatly, but when bank policy and Williams's opinions diverged, "he tends to ignore [the bank's decision] and refuse[s] to act accordingly," which "limited the type of tasks that the management can give to him" and caused a "delay in his work delivery" and "inconsistency in his job performance."

(4) "Ignorance to business priority set [b]y management." Kong wrote that Williams "appears to put technology advancement above business priority," and illustrated this comment by explaining that when Williams would discuss approaches to some system issues, "he is very strong in using new technology which . . . requires a long process and [is] costly to introduce. A lot of time [w]as spent on such discussion. He will spend more time on tasks that interested him, than on tasks important to the team/ Bank." Kong concluded that Williams's approach occasionally caused work delay. (CW Ex. N).

At his deposition, Williams vehemently disagreed with these assessments and regarded Kong's comments as libelous. (Compl. ¶ 224; Tr. #2: 167-71). For example, he characterized Kong's statement that his

tardiness caused frustration to other teammates as "a boldface lie." (Tr. #2: 65). He complained that although Kong changed his work hours from 10:00 a.m. to 6:00 p.m., Kong had nevertheless refused his flextime request for daily variable hours. (Tr. #2: 66-68). Regarding Kong's comment that his personal life affected his work, Williams noted that others on the team were also buying homes and were engaged in personal activities while on the job, and that he put in his time by staying late, until his job was done for the day. (Tr. #2: 70-71). He also explained that his responsibilities toward his tenants did not interfere with his job. (Tr. #2: 71). In his view, Kong used his tenants as an "excuse" to say that his life was interfering with his work. (Tr. #2: 79-80).

Williams did not accept the "unwilling to accept instruction and direction" comment either, claiming that Kong provided neither leadership nor direction and was often in the way. (Tr. #2: 71). Concerning Kong's criticism that Williams ignored business priorities set by management, Williams "translated" the statement to what Kong really meant: "Christian ignored my priorities," given that "he felt he was the decision maker period." (Tr. #2: 72). Williams testified that he had begun to prepare a written rebuttal to this evaluation but had not completed it; he talked to Gail Prescott in Human Resources instead, spurred by the fact that 1998, under Kong, was the first year he had not received a bonus. (Tr. #2: 73).

In late July 1999, Kong opened Williams's Health, Life and Disability Coverage statement,

which listed his domestic partner, Carlos Pellot. (Compl. ¶ 115). Kong called Williams into his office, handed him the statement, and told him that he had opened it by mistake. (*Id.*). Williams never asked Kong if he had read it, although he was "sure" Kong had, and that it was "no mistake" that he had opened it. (Tr. #2: 20-21).

At his deposition, Williams was asked if he had ever used the word "discrimination" with bank officials when discussing Kong's unfair treatment of him. He first stated that he had used the word only with Gail Prescod, alerting her that Kong was possibly anti-gay, but then backtracked and stated that he did not use the word discrimination because it was "a serious charge with more serious implications." (Tr. #2 159-60). He explained that he was reticent about raising claims of discrimination with bank managers: "I didn't go into motive. . . . Discrimination is not a diplomatic way to go about trying to resolve a problem" (Tr. #2: 156), and he "did not feel that it would have been politically good" for him to make that charge while he was still on the team and trying to find another position in the bank. (Compl. ¶ 122; Tr. #2: 90-92). On the other hand, the record indicates that Williams did not hesitate to communicate his negative views about Kong both to Kong himself and to bank officials. On November 2, 1999, Williams wrote Kong an e-mail in response to a memorandum Kong had authored which apparently contained criticisms of Williams. William stated,

> I recognize that your memo, while descriptive highly distorts the truth and is a political play [sic] far more than a reasonable description of events of my performance. In fact, it smacks of blackballing, a highly unethical thing for any manager to encourage in any company. I strongly discourage you from continuing such action. I strongly feel that I have contributed to this team greatly, however I also feel that your function point mentality of performance is misguided, unfair, and just plain wrong.

(CW, Ex. X). In March or April 2001, Williams advised Shefferd that he was "putting together documentation" that he believed would prove that Kong was trying to "blackball" him. (Tr. #2: 90). He wrote an e-mail to Gary Ford on April 11, 2001 in which he stated, "Raymond and I do not get along. I will be extremely surprised if I am on our team list because of our mutual view of each other," and expressed his desire to work for an "honest straightforward manager." (CW Ex. Y).

At his deposition, Williams was questioned about an incident that had taken place sometime during 2000, when he was informed by a co-worker that he no longer had access to a password they needed to resolve a problem and that they had to ask John Shea for it. Williams retorted, "Oh, I would like to blow up John Shea." (Tr. #2: 93-95). He characterized the remark as "flip" and "off the cuff," but related that Shea became upset once he heard about the remark. (Tr. #2: 94-95). Williams was called into Kong's office

and, in the presence of Gilani, Kong told him that "they are going to try to get me fired over this." (Tr. #2: 97). Williams responded, "Go ahead. If you want to fire me, fire me. I'll sue you." (*Id.*). Williams explained that, at that point, he would have sued Kong for wrongful dismissal; he was not sure he would have sued for "gay discrimination." (Tr. #2: 98). He apologized to Shea via e-mail. (Tr. #2: 103; Defts' Ex. G (Deposition Exhibits) – Ex. L).

An undated and unsigned 1999 Performance Appraisal authored by Gilani again rated Williams at "3," "at target". (Tr. #2: 75-76; CW Ex. O). Williams again disagreed with the criticisms contained in this appraisal. Noting that his punctuality issues were addressed again, Williams blamed Kong for the comment and asserted that Kong's attitude toward his punctuality was unreasonable. (Tr. #2: 78-79). With the benefit of hindsight, he saw that some of his punctuality issues were "symptomatic from the workplace bullying" that he had been subjected to, but basically, "I came in, did my time and I did the job I was asked to do, and I did it to the best of my ability under what I considered to be an extremely hostile work environment." (Tr. #2: 78-79). As for timeliness in completing work, Williams stated that the criticism was "symptomatic of Raymond Kong constantly moving the goal posts on me. It was nearly impossible to get him to sign off on a specification." (Tr. #2: 80). As an example, he related a story from June 2001 when Kong asked him to remove the "bugs" from a server. He completed the task and left on vacation.

(Tr. #2: 80). When he returned to the office, Kong informed him that the server had a bug in it and that he did not understand Williams's code. (Tr. #2: 80-81). According to Williams, a co-worker told him that the bug was in Kong's database, that his code was understandable, and that "[Kong] is just out to get you, Christian." (Tr. #2: 81-83).

Williams asserts that he complained to numerous bank officers about Kong's treatment of him, to no avail. (Compl. ¶¶ 74, 84, 88-96, 102, 119, 121-23, 153, 167). He described individual defendants Rutter, Bibb, Ford, and Shefferd as exercising "supervisory capacity over Defendant Kong for a period when Defendant Kong was employed in a supervisory capacity over the Plaintiff." (Comp. ¶¶ 16-20). Williams testified that he made it clear to Rutter and Shefferd that Kong was "incapable of giving [him] a fair and impartial review," and asked for a review in which Kong did not take part. They declined his request. (Compl. ¶ 84; Tr. #1: 123; Tr. #2: 86-87). Williams told Rutter that Kong was treating him unfairly, but he never told him that he thought Kong was discriminating against him based on his sexual orientation. (Tr. #2: 87, 159). He recalled that the last time he complained to Rutter about Kong, Rutter responded, "Just do your job or you won't have a job." (Tr. #2: 88). Williams deduced that Kong had "slammed" him to Rutter, since someone had to have told Rutter he was not doing his job. (Tr. #2: 196). He also did not mention discrimination to other bank official. (Tr. #1: 135; Tr. #2: 156).

Williams realized that because the management hierarchy did not respond to his complaints about Kong and "nothing was going to be done," his only choice was to transfer out of the LOPS team, although he wanted to stay at the bank. (Tr. #2: 88-89). On January 26, 1999, Williams e-mailed Kong, stating that he felt that it was "in my best interests to move on to a different project . . . I have enjoyed working on the LOPS team, I simply feel that three years is long enough for any project and I have a strong desire to work on something new." (Tr. 2: 141 and Dep. Ex. P). During the summer of 2000, Williams informed Kong that he was setting up interviews to transfer to another area of the bank, and Kong encouraged him to look. (Tr. #1: 118-20). One interviewer told Williams that Kong had told him "that [Williams was] kind of hard to get along with, and [Williams's] JAVA [computer skills were not] very good." (Tr. #2: 172). Williams complained about Kong's comment to Shefferd, asking him, "How am I supposed to get off of this guy's team if I am being slammed?" (Tr. #2: 173). Williams felt that the basis for Kong's statement was that "he didn't like me because I was gay, and he thought I was HIV positive" (Tr. #2: 145), and characterized Kong's statement as slander. (Tr. #2: 172).

In September 2000, the Chase Manhattan Corporation – the parent of the Chase Manhattan Bank – announced that it had acquired J.P. Morgan & Co. (*See* Affidavit of Belinda L. Palmer, former Vice-President of J.P.Morgan Chase Employee Relations,

sworn to Apr. 6, 2004 ("Palmer Aff.") at ¶ 3). Following the merger, the employees from the two banks' Investment Bank Technology & Operations Departments "came together to form a single department," and the managers of the combined departments "examined their various teams to determine how best to structure the Department to support the newly merged business units." (*Id.* at ¶¶ 8, 9). The managers decided to "combine the Foreign Exchange ("FX") and Interest Rates ("IR") application developers teams" into a new unit, the "FX Systems Team," which would have three application developer positions. (*Id.* at ¶ 10). As a result of the merger of the two teams, "one of the previous positions would be eliminated." (*Id.*).

The managers evaluated the current FX team employees, which included Williams, Willie Li, and Hevel-Jean Baptiste, and the IR employee, Harrison Wu. (*Id.* at ¶¶ 11-13). Palmer recounted that "Li, Baptiste, and Wu were selected for the new FX Systems Team; as a result, Plaintiff's employment was to be terminated." (*Id.* at ¶ 14). Because the bank's Employee Relations Department reviewed and was required to approve all job eliminations and employment terminations, Palmer asked Mary Keller, a Human Resources Generalist, to prepare a memorandum "which outlined the consolidation of the FX and IR application developer teams, the employee selection criteria for the new FX System Team, and a demographic analysis of the four candidates." (*Id.* at ¶¶ 15, 16). Palmer then "reviewed the proposed job

elimination and termination of employment plan in order to determine, *inter alia*, whether the plan had a disparate impact on any protected group." (*Id.* at ¶ 17).

An e-mail that Keller wrote to Peter Bibb on May 24, 2001 states, "Peter, Employee Relations has asked to see the evaluations of the other 3 candidates considered for this developer role. There is some concern about displacing an incumbent when the role continues to exist. I'll keep you posted . . . Mary." (*Id.* at Ex. B). Follow-up e-mails sent among Keller and other bank officials revealed further concern that managers might be forced to "let talented people walk out the door while we keep those who are considered weaker performers." (JPMG 000044, found in Plaintiff's Binder #2). Keller noted that although Williams had "full project lifecycle experience," he also had had numerous conflicts with other teams, displayed a negative attitude, was unable to complete assignments on a timely basis, required heavy supervision, and showed an unwillingness to accept feedback and an inability to adopt to the changing organization environment. (JPMG 000045). She observed that Employee Relations did not believe that incumbents should be displaced even if other internal candidates were stronger. (*Id.*). In response, bank officials expressed their preference for the stronger performers and a rolling selection process. (JPMG 000043).

Defendants submitted a declaration by Mary Keller to clarify her initial e-mails referring to displacing "incumbents." Keller explained that Kong had

been selected to manage the new FX Systems Team and that he would be the one evaluating the four candidates for the three slots on the new team. (*See* Declaration of Mary C. Keller, executed Aug. 11, 2004, ("Keller Decl.") at ¶¶ 5-6). Based on past performance and potential future performance, Kong recommended to senior management – Bibb and Rutter – that Jean-Baptiste, Wu, and Li be selected and that Williams's position be eliminated. (*Id.* at ¶ 8). When she wrote her memorandum to Palmer concerning the elimination of Williams's job, Keller referred to it in the subject line of the memorandum as "FX AD Job Elimination: Christian Williams" because the two teams had not yet been combined and Williams was a member of the FX AD team. She also did not specify that the two teams were being combined. (*Id.* at ¶ 9). Keller continued, "As a result, when Ms. Palmer reviewed my memorandum, she had the erroneous impression that the Department proposed to eliminate the incumbent in one position and bring someone in from outside the Team to take over that position." (*Id.* at ¶ 9). This caused Palmer to express concern that the bank was "displacing an incumbent in favor of another candidate even though the incumbent's position continued to exist" when the other candidate was "evaluated as superior to the incumbent." (*Id.* at ¶ 9).

Keller stated that the bank had no policy against displacing incumbents in favor of other superior internal candidates during a workforce reorganization/ consolidation: while the bank preferred not to

displace an incumbent whose precise role was continuing, she and Palmer clarified that because the FX and IR teams were being combined, "*each* of the four candidates was an incumbent and was being considered for what would constitute *new* roles within the FX Systems Team." (*Id.* at ¶ 10) (emphasis in original). Thus, the concern about displacing incumbents expressed by Employee Relations "no longer existed and the job elimination and termination of Plaintiff's employment was approved." (*Id.*).

The defendants also provided a copy of Keller's memorandum to Palmer which indicated that the selection criteria against which the four candidates for the new FX Systems Team were evaluated concerned three areas of their expertise: (1) "full development project lifecycle experience (1 yr +)"; (2) "experience in RPG (3 yrs +) or Java (1 yr +)"; and (3) "FX and Swaps Front Office experience (2 yrs +)." (Palmer Aff., Ex. B (Memorandum of Mary Keller to Belinda Palmer dated May 17, 2001)). Keller's memorandum indicated that Williams had been at the bank since 1995, while Wu had been employed since 1998 and Li and Baptiste since 2000. (*Id.*).

The defendants also provided a copy of Kong's evaluation of the four candidates, which contained some of Palmer's handwritten notes. (Palmer Aff. ¶ 16 & Ex. B). Kong provided scores in each of the three selection criteria categories, rating Williams the lowest with a total of 30 points. His evaluation of Williams did not focus so much on Williams's experience in the three categories as it did on his view that

Williams had exhibited a "negative attitude towards the organization structure," "multiple conflicts with other external teams," and an inability to "complete assigned programming projects within reasonable time frame. Heavy supervision has been required." (*Id.*). In the Feedback Notes section, Kong wrote that Williams "doesn't fit the current and future work environment of my group, and perhaps any other groups within IB. He fails in adapting to the changing organization environment." (*Id.*). Kong observed that Williams sought to control software development, but did not have the necessary skills to do so, and that when he could not deliver an assignment, he tended to blame the "organizational structure." (*Id.*).

Kong's evaluation of the three other candidates was generally positive. In the "Feedback Notes" section of Baptiste's evaluation, Kong commented that Baptiste had demonstrated "self-motivation and strong-desire to learn." (*Id.*). Kong regarded Baptiste as a "valuable contributor to software development" who would only grow better with time. Palmer's notes indicated that Baptiste had less than the required experience in two of the three selection criteria categories. Nevertheless, Baptiste was rated the highest (70 points) of all the candidates. (*Id.*).

With regard to Wu, Kong wrote in the "Feedback Notes" that although Wu did not work in his group, he was "happy with [Wu's] trading floor exposure and work ethic." (*Id.*). While noting that Wu did not have the "exact JAVA skill that I am looking for," Kong felt that Wu's experience nevertheless positioned him to

do the kind of programming performed by Kong's team. He also felt that his group would provide Wu with "a path to grow with good chance of success." (*Id.*). Palmer's notes indicated that Wu had "no experience" in one of the selection criteria. He was rated at 60 points, the second-highest of the four candidates. (*Id.*).

Kong rated the final candidate, Willie Li, at 42 points, and opined that Li had a "good attitude and commitment to complete assigned tasks." Kong was confident that Li could learn the technology that the bank used, with which Li had no experience. Kong indicated that Li had "room for improvement" in his JAVA programming. Palmer made no notes on Li's evaluation. (*Id.*).

In his Rule 56.1 Statement, Williams wrote: "[I]t is evident from the three reviews that Defendant Kong was clearly out to blackball the Plaintiff out of his job, even though Plaintiff was the most qualified of the candidates, having been on the team for five and one half years, having been JAVA 2 certified," and having a thorough knowledge of the other systems used. (Pltff's Rule 56.1 Statement at ¶ 138). Specifically, he asserts that, with regard to the three selection criteria, he had 10-plus years of experience in the full development project lifecycle; he was the only team member who was JAVA 2 Certified at the time he was terminated from the bank; and he had been doing trading floor support since 1989. (*Id.* at ¶¶ 131, 133-34).

On June 28, 2001, Peter Bibb flew in from London to tell Williams that his employment was being terminated. (Tr. #2: 107).

As Kong was also in the room, Williams asked if he could speak with Bibb privately and then told him, "Packaging me out does not solve your problem, you got a big problem on this team. Raymond Kong is the problem, not me." (Tr. #2: 108). Williams did not mention to Bibb that Kong had discriminated against him on the basis of his sexual orientation (Tr. #2: 109), nor did he mention to anyone at the bank that he was being terminated because he was gay. (Tr. #2: 38).

Also on June 28, Shannon Terry handed Williams a letter from the bank, stating that his position had been eliminated "due to changes in our business," and that his employment would be terminated on August 30, 2001. (Tr. #2: 113; CW Ex. BK). The letter informed him of the support services and benefits available, and indicated that Williams would receive his salary and benefits during the 60-day notice period preceding his termination date, eighteen weeks of severance, and a variety of career services. (Compl. ¶ 158; CW Ex. BK; Tr. #2: 107, 112-14, 120-21, 217). During Williams's conversation with Terry, he did not tell her that he felt discriminated against because he was gay. (Tr. #2: 115). He testified that he had wanted to talk to Shefferd that day to tell him that he believed Kong "did this because I'm gay," but Shefferd was not there. He "talked with Pat McGirt a little bit about it instead." (Tr. #2: 117). Upon further

questioning, Williams admitted that he had talked with McGirt after his termination, but did not recall the date. (Tr. #2: 117-18).

In a bizarre e-mail to Bibb dated June 28, 2001, Williams suggested that Bibb should contact a medium in order to find out "what is going on" with Kong and the LOPS team. In the same e-mail, he referred to an appointment that he had had with a psychic artist who allowed him to have a conversation with his deceased grandparents and who then drew a picture of them. (CW Ex. Z).

Following his termination, Williams sought to "negotiate" with the bank. (Compl. ¶ 124). In response to a November 21, 2001 letter written by Williams's then-counsel, Denise Bonnaig,[6] to the bank, Vice President John Ve[illegible]a wrote the following in a letter dated January 16, 2002:

> Please be advised that after a thorough investigation, I have determined that Mr. Williams was treated appropriately in all respects. His termination was based upon a legitimate business decision, specifically, a position elimination. Moreover, there is no

---

[6] Williams testified about a "violent outburst" he had had on September 13, 2002 in Bonnaig's office: "I lost it. I mean, I basically, you know, I threw a glass on the floor, called her a stupid bitch, what do you think I'm not mental," and she called the police. (Tr. #1: 51-53). Shortly thereafter, Bonnaig moved to withdraw as counsel, an application that the court granted in an order filed October 16, 2002.

> evidence of discriminatory animus. Any claims to the contrary are false.

(CW Ex. B). Williams considered the statements in this letter libelous. (Tr. #2: 163-65). He testified that although Vega had said that his position was eliminated, it was not eliminated, as supposedly demonstrated by Keller's e-mail statement that he was an incumbent and that the role continued to exist. (Tr. #2: 164). He did not view the letter as expressing Vega's opinion. (Tr. #2: 165).

Williams also charged that the defendants' discriminatory animus was "ferociously demonstrated" by the fact that he was replaced by John Freund – revealing that his job was not eliminated. (Tr. #2: 165). He claims that approximately ten days after he served the bank with his complaint, the defendants "attempted to cover up the fact that Plaintiff had been replaced by illegally, inappropriately, and unfairly packaging out John Freund the employee who had been sitting in Plaintiff's former cubicle using Plaintiff's former phone extension, and working on the LOPS team's Java LOPS project as Plaintiff used to do when reporting to Defendant Kong." (Compl. ¶ 126 Tr. #2: 165).

In response to this contention, defendants submitted an affidavit from Shannon Terry, an Associate and Human Resources Generalist at the bank. (*See* Affidavit of Shannon Terry, sworn to on Aug. 13, 2004). Terry had been the bank official who prepared

and submitted a memorandum regarding the elimination of Freund's position, which she attached to her affidavit. (Terry Aff. at ¶ 3 & Ex. A). Terry averred that Williams's speculation about Freund's position and termination was wrong: Freund had been employed on the Rates and Global Books Teams as an Applications Developer on a project that was phased out in April 2002, and he occasionally provided assistance to Kong and the LOPS team. (Terry Aff., ¶ 4). Terry asserted that Kong never offered Freund a position on the LOPS team since all three positions had been filled. She also declared that the proposal to eliminate Freund's position had been submitted one week before Williams commenced his action, not ten days afterward. (*Id.* at ¶¶ 4, 5).

Williams charged in his complaint that, "upon information and belief," an internal bank investigation took place which resulted in Kong's termination in January 2003. (Compl. ¶ 127). In his summary judgment materials, Williams included Kong's letter of resignation, dated December 20, 2002 and effective January 3, 2003, indicating that he had accepted a position elsewhere. (CW Ex. JPMC 000369). Williams also asserted that a July 2002 "Climate Study" of Kong's group and a resulting warning issued to Kong in August 2002 confirm that Kong had engaged in discriminatory acts against him. He argued that the Climate Study acknowledges discriminatory comments made by Kong based on race and sexual orientation, and that it "demonstrates the extremely hostile, discriminatory, demeaning, psychologically

abusive work environment" that Kong created and that he endured for nearly four years. (Pltff's Rule 56.1 Statement ¶ 153; ¶ 158).

In her affidavit, Terry counters this assertion, stating that she conducted the Climate Study (an investigation into Kong's management style and ability, which involved interviews with team members) and prepared the warning issued to Kong. (Terry Aff., ¶¶ 7, 8). Terry claims that the Climate Study was not undertaken in response to Williams's situation but was based on concerns raised by employees on Kong's team in July 2002, after Williams had left. Also contrary to Williams's contentions, Terry stated that the Study did not conclude that Kong had discriminated against anyone, but rather that he had "numerous managerial issues that affected everyone on his Team." (*Id.* at ¶ 9). She made specific reference to notes she took during the Study (reprinted in Williams 56.1 Statement at pages 28-29).[7] Under the topic "Discriminatory Comments; Race/Sexual Orientation," she cited a comment by an African-American team member who thought Kong's statement to him that "People like you are not meant to be leaders" might be a racial slur. She also jotted down an "inappropriate" comment by a team member who overheard Kong say "You saw what happened to Christian, you are next." (*Id.* at ¶ 10).

---

[7] A copy of the Climate Study and Kong's Warning Statement is attached to Williams's July 9, 2004 letter to the court.

Terry concluded that the first comment was not driven by discriminatory animus, but rather was prompted by Kong's "inappropriate managerial style," as he often told team members that they were "incompetent and not meant to lead," and the second comment reflected Kong's "personality clash with Plaintiff – when Mr. Kong referenced Plaintiff to team members, the universal assumption was that if a Team member disagreed with Mr. Kong's thinking and/or couldn't get along with him, he or she would eventually find themselves job eliminated (fired) like Plaintiff." (*Id.* at ¶ 11).

Also under the "Discriminatory Comments" heading of the study, Terry indicated that some team members "Reference[d] Christian Williams." (*Id.* at ¶ 10). Terry determined that the unspecified allegations "were nothing more than empty speculation; these Team members knew that Plaintiff was gay, that he had been job eliminated and assumed that Plaintiff's sexual orientation might have had something to do with his termination. No one, however, could provide any additional information which might show there was any connection between those facts." (*Id.* at ¶ 12). She added that "everyone" on Kong's team had issues with his managerial style, and had there been evidence of discriminatory animus, Kong would have been given a Final Written Warning or terminated immediately. (*Id.* at ¶ 13).

In July 2002, Williams began to see a psychiatrist. (Compl. ¶ 176). At his deposition, he produced an unnotarized "affidavit" signed by Dr. Henry

Beaulieu on October 8, 2002. (CW Ex. R). Dr. Beaulieu wrote that he saw Williams on Tuesdays at the Family Medical Practice in Brooklyn; that he diagnosed Williams as suffering from Acute Post Traumatic Stress Disorder and Prolonged Duress Stress Disorder "as a result of being psychologically abused at work and cruelly packaged out by his boss Mr. Raymond Kong," and that he prescribed certain drugs to assist with Williams's depression and anxiety. (*Id.*). Dr. Beaulieu regarded Williams's short-term and long-term prognosis as "good" if Williams complied with his medication and therapy regimen. (*Id.*).

Williams testified that, following termination, he visited a psychotherapist every two to three weeks. (Tr. #1: 20, 29-31). He also sought "professional counsel" from his friend, Angela Torres-Esteves, a retired Registered Nurse, to whom he talked once a week and whom he saw once a month. (Tr. #1: 9-11). He stated he was "never officially under her care," and she derived no compensation from tending to him. (Tr. #1: 11). At his deposition, Williams produced an affidavit from Ms. Torres-Esteves dated August 5, 2002 in which she opined that Williams "exhibits all the major symptoms of Post Traumatic Stress Syndrome as a result of Raymond Kong's pattern of malice against him," and described his symptoms in detail, including, *inter alia,* sleep problems, flashbacks, impaired memory, panic attacks, depression, physical numbness, occasional violent outbursts, and hypervigilance. (CW Ex. Q at ¶¶ 8-31). Williams surmised that he had begun suffering from PTSD symptoms

while he was working for Kong, but "the packaging out, basically pushed it up into acute PTSD." (Tr. #1: 12, 39). Williams also explained that his PTSD diagnosis allowed him to understand why he had been "obsessed" by Kong's behavior. (Tr. #1: 45, 61).

Williams stated that after he received Vega's response, his attorney told him that his only choice was to file a lawsuit. (Tr. #2: 178). He did not know if his attorney had filed administrative charges with the Equal Employment Opportunity Commission, the New York State Division of Human Rights, or the New York City Commission on Human Rights. (Tr. #2: 176-77).

ANALYSIS

I. Summary Judgment Standards

The court may enter summary judgment only if it concludes that there is no genuine dispute as to any material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. *See, e.g., Island Software & Computer Svc., Inc. v. Microsoft Corp.,* 413 F.3d 257, 259 (2d Cir. 2005); *Whidbee v. Garzarelli Food Specialties Inc.,* 223 F.3d 62, 68 (2d Cir. 2000). It is axiomatic that the role of the court on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried," *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986).

The movant bears the initial burden of informing the court of the basis for his motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that demonstrate the absence of a genuine issue of material fact. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Koch v. Town of Brattleboro, Vermont,* 287 F.3d 162, 165 (2d Cir. 2002). In making this judgment, the court must view the record in the light most favorable to the non-moving party. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986); *Horvath v. Westport Library Ass'n,* 362 F.3d 147, 151 (2d Cir. 2004). If the non-moving party has the burden of proof on a specific issue, the movant may satisfy its own initial burden by demonstrating the absence of evidence in support of an essential element of the non-moving party's claim. *See, e.g., LaBounty v. Coughlin,* 137 F.3d 68, 73 (2d Cir. 1998); *Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir. 1995). If the movant fails to meet its initial burden, the motion will fail even if the opponent does not submit any evidentiary materials to establish a genuine factual issue for trial. *See, e.g., Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 160 (1970); *Giannullo v. City of New York,* 322 F.3d 139, 140 (2d Cir. 2003).

If the moving party carries its initial burden, the opposing party must then shoulder the burden of demonstrating a genuine issue of material fact. *See, e.g., Celotex,* 477 U.S. at 322; *Reeves v. Johnson Controls World Servs., Inc.,* 140 F.3d 144, 149 (2d Cir.

1998). In doing so, the opposing party cannot rest on "mere allegations or denials" of the factual assertions of the movant, Fed. R. Civ. P 56(e); *see, e.g., Rexnord Holdings, Inc. v. Bidermann,* 21 F.3d 522, 525-26 (2d Cir. 1994), nor can he rely on his pleadings or on unsupported assertions, conjecture, or conclusory factual allegations. *See, e.g., Goenaga,* 51 F.3d at 18. He must also "do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986), by presenting specific evidence in support of his contention that there is a genuine dispute as to one or more of the material facts. *See, e.g., Celotex,* 477 U.S. at 324; *Goenaga,* 51 F.3d at 18. "It is insufficient for a party opposing summary judgment 'merely to assert a conclusion without supplying supporting arguments or facts.'" *Minton v. Lenox Hill Hosp.,* 160 F.Supp.2d 687, 692 (S.D.N.Y. 2001) (quoting *BellSouth Telecomms., Inc. v. W.R. Grace & Co.,* 77 F.3d 603, 615 (2d Cir. 1996)). Summary judgment is as appropriate in employment discrimination cases as in other types of cases. *See Jetter v. Knothe Corp.,* 324 F.3d 73, 77 (2d Cir. 2003).

II. The Merits

The defendants challenge plaintiff's claims, asserting that there are no genuine issues of material fact with respect to any of those claims under state or local human rights laws.

A. Sexual Orientation Discrimination

1. Legal Standard

The NYSHRL, Executive Law § 296, and the NYCHRL, N.Y.C. Admin. Code § 8-107, both prohibit discrimination on the basis of sexual orientation. The NYSHRL provides:

> It shall be an unlawful discriminatory practice: For an employer . . . , because of the . . . sexual orientation . . . of any individual . . . to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.

Exec. Law § 296(1)(a). Similarly, the NYCHRL provides:

> It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived . . . sexual orientation, . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

N.Y.C. Admin. Code § 8-107(1)(a)

It is well-established that "[t]he standards for evaluating employment discrimination claims brought under state and city human rights laws are the same as those employed in assessing federally-based claims." *Thomas v. New York City Health & Hospitals Corp.*, 2004 WL 1962074, *11 (S.D.N.Y. Sept. 2, 2004)

(citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 n.1 (2d Cir. 2000); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 n.4 (2d Cir. 1995) (abrogated on other grounds by *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998)). *See also Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 391 (2004) ("The standards for recovery under the New York State Human Rights Law . . . are the same as the federal standards under title VII of the Civil Rights Act of 1964. . . . Further, the human rights provisions of the New York City Administrative Code mirror the provisions of the Executive Law and should therefore be analyzed according to the same standards."). Because Williams has not produced direct evidence of sexual-orientation discrimination, his claim is evaluated pursuant to the burden-shifting procedure set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Thus, to establish a discrimination claim based on sexual orientation, the plaintiff must demonstrate that he was subjected to an adverse employment action, and that his sexual orientation was a motivating factor in the action. *See McDonnell Douglas*, 411 U.S. at 802; *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 85 (2d Cir. 2001); *Hester v. Rich*, 2004 WL 1872296, *7 (S.D.N.Y. Aug. 19, 2004) (citing *James v. N.Y. Racing Ass'n*, 259 F.3d 149, 153-54 (2d Cir. 2000)). The first step in undertaking such a showing involves proof of a *prima facie* case. *See, e.g., Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142

(2000); *Windham v. Time Warner, Inc.*, 275 F.3d 179, 187 (2d Cir. 2001). Plaintiff's burden to establish a *prima facie* case is "minimal." *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997) (*en banc*). He need only demonstrate that he is a member of a protected class, that he was qualified for his position, that his employer terminated him or subjected him to some other adverse employment action, and that this action took place in circumstances suggesting that it was motivated by plaintiff's membership in the protected class. *See, e.g., Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 91-92 (2d Cir. 2001); *James*, 233 F.3d at 154 (quoting *Fisher*, 114 F.3d at 1335).

If plaintiff makes a *prima facie* showing, the defendant "may rebut that showing by articulating a legitimate, non-discriminatory reason for the employment action." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). If the defendant can articulate such a non-discriminatory reason for its actions, the burden-shifting process is at an end, and the plaintiff is left with the obligation of demonstrating by a preponderance of the evidence that discriminatory animus was in fact a motivating factor in the action. *See Reeves*, 530 U.S. at 143; *Weinstock*, 224 F.3d at 42; *Fisher*, 114 F.3d at 1336. Thus, to survive a summary judgment motion, the plaintiff must make a showing that there is evidence upon which the trier of fact could find that defendant's proffered reason was false, and that discrimination was the reason for its actions. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S.

502, 515 (1993); *Fisher,* 114 F.3d at 1337. The Supreme Court in *St. Mary's Honor Center* observed, "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the Plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original). The *Reeves* decision "clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Schnabel v. Abramson,* 232 F.3d 83, 90 (2d Cir. 2000) (quoting *Reeves,* 530 U.S. at 143).

2. Application

(a) Prima Facie Case

Defendants argue that Williams did not satisfy the requirements for a *prima facie* case because the matters about which he complains – such as being excluded from meetings, having his work discredited in front of teammates, being told that his computer code was not understandable, being assigned to less desirable work – were not "adverse employment actions." (Defts' Brief at 14). They also contend that a plaintiff's alleged subjection to "excessive scrutiny" or negative performance evaluations does not rise to the level of adverse employment actions, citing *Hernandez v. Kellwood Co.,* 2003 WL 22309326, *16 (S.D.N.Y. Oct. 8, 2003) and *Manessis v. New York City Dep't of Transp.,* 2003 WL 289969, *13 (S.D.N.Y. Feb.

10, 2003), *aff'd* 86 Fed. Appx. 464 (2d Cir. 2004). *Id.* at 14-15. They make no other challenges to plaintiff's *prima facie* case.

The Second Circuit holds that a "plaintiff may suffer an 'adverse employment action' if [he] endures a 'materially adverse change in the terms and conditions of employment." *Richardson v. N.Y. State Dep't of Corr. Serv.,* 180 F.3d 426, 446 (2d Cir. 1999). A materially adverse change might occur in the context of a "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Galabya v. N.Y. City Bd. of Educ.,* 202 F.3d 636, 640 (2d Cir. 2000). A materially adverse change in one's terms and conditions of employment is also defined as a change in working conditions that is "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.*

We agree with defendants that many of the complaints that Williams raised about how Kong treated him did not amount to "materially adverse changes" in his employment that rose to the level of an adverse employment action. Case law makes clear that "not everything that makes an employee unhappy is an actionable adverse action." *Phillips v. Bowen,* 278 F.3d 103, 117 (2d Cir. 2002). Williams does not argue that his exclusion from meetings caused him to lose benefits or other material indicia associated with his officer position, and thus these

type of complaints are not materially adverse changes in his employment.

At the same time, termination of employment is such a materially adverse change. Because Williams alleges that he was terminated as a result of his sexual orientation (Compl. ¶ 158), he has met this prong of his *prima facie* case. As far as the other prongs of his *prima facie* case, Williams, as a homosexual, is a member of a protected class under the NYSHRL and NYCHRL. He has shown that he was qualified for his position, as he "establish[ed his] basic eligibility for the position at issue," and showed that he "possesses the basic skills necessary for performance of [the] job." *Slattery,* 248 F.3d at 91-92. *See Windham,* 275 F.3d at 187. Finally, he has submitted the barest slivers of evidence – two comments that may possibly indicate an anti-gay bias, his statement to Gail Prescod that anti-gay bias was a concern of his with regard to Kong's treatment of him, and some post-termination references to Kong's possible anti-gay bias – suggesting that his termination might be motivated by his membership in the protected class. Particularly because defendants did not challenge the other prongs of Williams's *prima facie* case, and because the showing plaintiff must make is so minimal, we conclude that he made a *prima facie* showing.

(b) Plaintiff's Prextext Case

(1) A Neutral Reason

The defendants have articulated a legitimate reason for terminating Williams. They represent that Williams was terminated because of a restructuring and reduction in force that followed in the wake of the bank's merger with J.P. Morgan & Co. (Defts' Brief at 15-16). Defendants explain that the Technology and Operations Departments from the two banks consolidated into a single department; the managers of the new department determined that they would combine the Foreign Exchange and Interest Rates application developers teams into the FX Systems team; the new team would have three positions and one of the previous positions would be eliminated; they evaluated the four employees then employed on the Foreign Exchange and Interest Rates teams, which included Williams; they decided to terminate Williams "as the candidate with the worst potential going forward" (Defts' Brief at 16); the decision was reviewed by the Employee Relations Department, which approved the plan; and Williams was terminated. (*See* Palmer Aff. ¶¶ 3, 8-17).

The burden on the defendants at this stage is minimal. They are required only to articulate, not to prove, "some legitimate, nondiscriminatory reason" for their employment decision. *McDonnell Douglas,* 411 U.S. at 802. "Any stated reason is sufficient; the employer need not persuade the court that the proffered reason was the actual reason for its decision,"

Tarshis v. Riese Org., 211 F.3d 30, 36 (2d Cir. 2000), and a reduction-in-force or restructuring resulting in an elimination of jobs "often is a legitimate reason for dismissing an employee." *Id.* at 37. Thus, although Williams argues that his job was not eliminated and insinuates that the defendants' reason was false, defendants need only proffer a legitimate reason for their action, and they have certainly carried their burden by pointing to their restructuring and consolidation process as such a reason.

(2) Pretext and Discrimination

Williams's claim of sexual orientation discrimination founders because he fails to provide evidence sufficient for the trier of fact to find that defendants' proffered reason was false, and that discrimination was the reason for their actions.

There does appear to be a disconnect between the selection criteria listed on the template against which the four candidates for the new team were evaluated – which were solely experience-based – and Kong's evaluation of Williams. That assessment was based more on Williams's negative attitude than on his experience, which clearly outpaced the other candidates. But the anti-discrimination statutes "may not be used as a vehicle for second-guessing an employer's business judgment," *Davidson v. Time, Inc.*, 972 F.Supp. 148, 153 (E.D.N.Y. 1997), and an employer may make "bad business judgments" as long as its decisions were not made for prohibited discriminatory

reasons. *Brown v. Society for Seaman's Children,* 194 F.Supp.2d 182, 191 (E.D.N.Y. 2002) (quoting *Brown v. Time, Inc.,* 1997 WL 231143, at *12 (S.D.N.Y. May 7, 1997)). The fact that Kong rated Williams the lowest of all the candidates based upon his problems in fitting into the organizational structure is a lawful reason not to choose him, despite his experience.

Moreover, although Williams vociferously disagreed with the negative evaluations of his performance and the final negative evaluation which resulted in his termination from employment, there is no basis in the record from which a rational juror could find that the reasons upon which his termination was based were false or a pretext for discrimination. The court in *Taylor v. Polygram Records,* 1999 WL 124456 (S.D.N.Y. May 8, 1999), expressed this dynamic eloquently:

> [Plaintiff's] attempt to rebut Defendants' proffered explanation by parsing the details of selected incidents, generally disputing her supervisors' assessments, and providing her own contrary appraisal of her work, is unavailing. Her Affidavit and memoranda may raise issues concerning the reasons *why* she failed to perform her job. . . . But faulting others for, or otherwise rationalizing, problems legitimately perceived by her employer does not establish pretext . . . [Plaintiff's] fundamental disagreement with the conclusions her supervisors drew . . . is not evidence that her supervisors' appraisals

> were a sham, invented to mask discrimination.

Id. at *10 (emphasis in original).

Further, Williams was unable to raise an issue that the defendants' reason was pretextual by speculating that Freund replaced him and thus defendants' statement that his position was eliminated was false. Williams reported his belief as to Freund's role, but offered no basis for inferring any personal knowledge of the pertinent facts. His speculation is simply not admissible, and hence cannot be considered in assessing defendants' summary judgment motion. *See, e.g., Goenaga,* 51 F.3d at 18. The only competent evidence as to Freund's position was provided by defendants through the affidavit of Shannon Terry, who made clear that Freund had not replaced Williams. In short, there is no triable dispute on this question.

Even if defendants' reason had been pretextual, Williams would still be on the losing end of his discrimination claim. A showing that the defendants' legitimate, non-discriminatory reason for its adverse employment decision was pretextual is not enough. "The plaintiff must also prove by a preponderance of the evidence that defendant's stated reason is 'a pretext for discrimination'." *Fisher,* 70 F.3d at 1433; *accord, e.g., Fisher,* 114 F.3d at 1338-40. As discussed above, Williams provides no facts to support a conclusion that his termination was motivated, even in part, by animus towards his sexual orientation. He provided no direct evidence of sexual orientation

animus, *i.e.*, a direct statement by any defendant reflecting anti-gay bias. The two comments uttered by Kong that Williams considered as such evidence are ambiguous at best: Kong's reference to him as "Christine" in 1997 and his date-unspecified comment that arguing with Williams was like arguing with his wife. It is questionable whether either statement suggests any discriminatory animus. The fact that Kong also made the second statement to a female employee betrays Kong's equal opportunity attitude toward people who argue with him, whether gay or straight, male or female, as opposed to an expression of anti-gay bias.

Although the record indicates that Kong was not the ultimate decisionmaker in plaintiff's termination – as Peter Bibb was the bank official who relayed that decision to him – Kong still played a substantial role in the decision-making process, as the management's decision not to hire Williams on the new FX Systems team was based upon his recommendation. Even if we regard him as a decisionmaker, however, these remarks – one of which was made five years before plaintiff's termination – would not sustain plaintiff's claim. Stray remarks by decisionmakers "unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision." *Ezold v. Wolf, Block Schorr and Solis-Cohen,* 983 F.2d 509, 545 (3d Cir. 1992). For stray remarks to be deemed significant, the plaintiff must show a nexus between the remark(s) and the adverse employment decision. *See Danzer v. Norden*

Sys., Inc., 151 F.3d 50, 56 (2d Cir. 1998). In this case, plaintiff fails to link Kong's two ambiguous statements to his eventual termination. Without such a nexus, Kong's reference to Williams as "Christine" and his alleged statement that "Arguing with you is like arguing with my wife" qualify as those kinds of "stray remarks" that, without more, are insufficient to support an inference of employment discrimination. *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001); *Woroski v. Nashua Corp.*, 31, F.3d 105, 109-10 (2d Cir. 1994).

The only other bit of evidence in the record concerning anti-gay bias is found in the Climate Study conducted on Kong, in which, under the "Discriminatory Comments-Race/Sexual Orientation" heading, Shannon Terry noted "References Christian Williams." As the person who conducted the Climate Study and investigated the matter, Terry explained this passing reference as based solely upon the speculation of team members who knew that Williams was gay and that his job had been eliminated, and who therefore assumed that his sexual orientation may have had something to do with his termination. (*See* Terry Aff., ¶ 12). Williams, who approached numerous bank employees in an effort to solicit affidavits to support his case (Tr. #1: 130), provided no evidence that would raise an issue of material fact that other team members heard Kong make any anti-gay references regarding him, his termination, or in any other capacity. Thus, this item in the Climate Study does

not raise a question of material fact on the issue of discriminatory animus.

In addition, the record is bereft of evidence that Williams complained to anyone at the bank that Kong had discriminated against him or terminated him because he was gay. The closest Williams came to suggesting that Kong was motivated by sexual-orientation bias was in 1998, when Prescod asked him whether Kong was treating him badly because he was anti-gay. Even then, Williams equivocated, responding "I don't know," and added "It is a concern of mine." Should this comment have served to put the bank on notice, as Williams claims it did (Compl. ¶ 119), he did not follow up with any specific complaints to anyone over the course of the next three years. For a person like Williams, who showed no aversion to communicating his thoughts to bank officials and to Kong himself regarding Kong's less-than-effective management style, the fact that the record is blank as to any complaints by him or anyone else linking Kong's management style with anti-gay bias underscores the absence of concrete evidence that Kong's treatment of him – as distinct from his apparent mistreatment of others under his aegis – was motivated by homophobia.

While it cannot be gainsaid that Kong's personality and management abilities were questionable – so much so that he eventually found other employment after receiving a warning – the record reveals that no one on his team was exempt from his negative approach. (*See* Climate Study/First Warning, attached

to Williams's July 9, 2004 letter to the court). It appears that Kong particularly had issues with Williams's performance and negative attitude toward authority (which were echoed, to an extent, in performance evaluations written by others), and that Williams may have been more sensitive than others on the team to Kong's treatment of him. However, these dynamics do not mean that Kong was anti-gay. Kong's rude and combative attitude may evidence hostility between him and Williams, but "does not provide ground for inferring that the hostility stemmed from plaintiff's" sexual orientation without some nexus, which Williams has been unable to provide. *See Brown,* 194 F.Supp.2d at 192; *Taylor,* 1999 WL 124456 at *17 (holding that the manager's criticism of the employee and accompanying lack of cordiality, was not evidence of discrimination).

Williams may have believed that the impetus behind Kong's engaging in the personality conflict was anti-gay bias. To make up for lack of evidence on this score, Williams peppered his complaint with instances of Kong's bad treatment and linked it to anti-gay bias by his conclusory statements and repeated expressions of his fervent belief that it was so. But his *ipse dixit* that Kong was biased cannot save his claim on summary judgment. *See, e.g., Slaitane v. Sbarro,* 2004 WL 1202315, *18 (S.D.N.Y. June 2, 2004) (plaintiff's "*ipse dixit* is not admissible evidence" in summary judgment motion); *Taylor,* 1999 WL 124456, at *16 (plaintiff's "belief, based on no evidence other than gut instinct, that [her supervisor]

treated her with hostility because of her race, cannot justifiably support an inference of discrimination" when nothing in the record supported that linkage). Plaintiff's repeated assertion that the problems he suffered on the job, which led to his eventual termination, were attributable to discriminatory animus is purely conclusory. Indeed, it simply repeats what Williams must prove to show that discriminatory animus motivated his termination. As difficult as his work conditions may have been, the courts have recognized that "personality conflicts between employees are not the business of federal courts," *Figueroa v. City of New York,* 2002 WL 31163880, *3 (S.D.N.Y. Sept. 27, 2002) (quoting *Vore v. Indiana Bell Tel. Co.,* 32 F.3d 1161, 1162 (7th Cir. 1994)), and that the federal discrimination laws do not impose a "general civility code." *Farragher v. City of Boca Raton,* 524 U.S. 775, 787-88 (1998).

B. Discrimination Based on Perceived Disability

Williams also claims that Kong discriminated against him on the basis of perceived disability, *i.e.,* an erroneous perception that he was HIV+. (Compl. ¶ 146).

Both the NYSHRL and NYCHRL protect individuals from discrimination on the basis of disability or perceived disability. Executive Law Section 296(1)(a) provides that it is an unlawful discriminatory practice for an employer to discharge an employee or to discriminate against an individual in

compensation or in terms, conditions or privileges of employment based upon the person's disability. "Disability" is defined in Executive Law § 292(21)(c) as, *inter alia*, "a condition regarded by others" as a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions. The NYCHRL similarly provides that it shall be an unlawful discriminatory practice for an employer to discharge or otherwise discriminate against an individual because of that person's "actual or perceived . . . disability." N.Y.C. Admin. Code § 8-107(1)(a).

Courts have found that, "[f]or the most part, disability claims brought pursuant to the NYSHRL and the *NYCHRL* are construed similarly to ADA claims." *Hester*, 2004 WL 1872296, *7 (citing cases). The *prima facie* elements of an ADA claim are: "(1) plaintiff's employer is subject to the ADA; (2) plaintiff was disabled within the meaning of the ADA; (3) the plaintiff was otherwise qualified to perform the essential functions of [his] job, with or without reasonable accommodation; and (4) plaintiff suffered [an] adverse employment action because of [his] disability." *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir. 2003). "[I]ndividuals with 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual'" are disabled within the meaning of the ADA. *Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 104 (2d Cir. 2003) (quoting 42 U.S.C. § 12102(2)(A)). A plaintiff is "considered 'disabled'

under the ADA if [he] is 'regarded as' suffering from a physical or mental impairment that 'substantially limits one or more of the major life activities,' even if [he] does not actually suffer from such an impairment." *Cameron,* 335 F.3d at 63 (quoting 42 U.S.C. § 12102(2)(A) & (C)) .

Under the "regarded as disabled" section of the statute, "the decisive issue is the employer's *perception* of his or her employee's alleged impairment." *Giordano v. City of New York,* 274 F.3d 740, 748 (2d Cir. 2001). Thus Williams must show "not only that the defendants 'regarded [him] as somehow disabled,' but that they 'regarded [him] as disabled *within the meaning of the ADA.*'" *Id.* (quoting *Colwell v. Suffolk County Police Dep't,* 158 F.3d 635, 646 (2d Cir. 1998) (emphasis in original)).

Courts follow "a three-step process for determining whether a plaintiff has a disability" protected by the ADA, *id.* at 641, and consider: (1) "whether the plaintiff suffered from a physical or mental impairment," (2) whether "'the life activity' upon which the plaintiff relied . . . constitutes a major life activity under the ADA," and (3) whether "the plaintiff's impairment 'substantially limited' [the] major life activity identified." *Id.* at 641. Defendants assert that Williams never identified a major life activity that they regarded him as unable to perform because of his allegedly erroneously perceived disability, and assume, for purposes of this motion, that he meant to assert that they regarded him as being unable to

work because of that perceived disability. (Defts' Brief at 20-21).

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court explained that an employee can be 'regarded as' disabled in two ways: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Id.* at 489. Williams's allegations fall within the former category. However, the only "evidence" that he introduced in an effort to establish that Kong (and apparently by extrapolation, the other defendants) regarded him as disabled is his syllogistic and conclusory reasoning that has no basis other than his belief that it is so: "So what Raymond saw is, well, if closeted Bob Fisch is going every week to see his AIDS doctor, and out Christian is going every week to every other week to see his doctor, he must be HIV positive, too, and that's a conclusion that I firmly believe basically." (Tr. #1: 126). Williams cites no statements that Kong or anyone else at the bank made concerning his alleged perceived HIV+ status. He points only to Kong's ubiquitous "pattern of malice" towards him and asserts that it was prompted by Kong's sexual-orientation animus and his perception that he was HIV+. (Tr. #2: 195). Basically, he has tacked his perceived disability claim onto his sexual-orientation discrimination claim, citing the same complaints as evidence of both

forms of discrimination. Moreover, he did not arrive at the conclusion that perceived HIV+ status may have played a part in Kong's treatment of him until sometime after he had left the bank. (Tr. #1: 132).

In addition, to make out a claim that one is regarded as disabled because they are viewed as being substantially impaired in the major life activity of working, a plaintiff must establish that he was regarded as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i). Williams does not even attempt to provide evidence to support this claim; he rather considers the claim in a literal, not legal, sense as one more element in Kong's negative treatment of him. Accordingly, he has failed to satisfy two elements of his *prima facie* case – that he was disabled within the meaning of the ADA and that he suffered an adverse employment action because of his disability. In sum, this claim fails as well.

C. Hostile Work Environment

Williams asserts that Kong created and maintained a "hostile harassment filled psychologically abusive work environment," and that Chase allowed him to do so. (Compl. ¶¶ 87, 106). Defendants respond that Williams's claim "must fail because he cannot establish that discriminatory conduct was frequent, severe or pervasive or physically threatening" (Defts' Brief at 22). They also cite cases such as *Viruet v. Citizen Advice Bureau*, 2002 WL 1880731, *16

(S.D.N.Y. Aug. 15, 2002), where the district court rejected a sexual-orientation hostile-environment claim – despite the plaintiff's supervisor having asked him whether he had AIDS or HIV and despite clients having called plaintiff a "faggot" – because plaintiff's "run-ins" with his supervisors were due to his "strong personality," not to his sexual orientation. (Defts' Brief at 23).

The same standard applies to hostile-work-environment claims brought pursuant to the NYSHRL, the NYCHRL, and Title VII. *See Palomo v. Trustees of Columbia Univ.*, 2005 WL 1683586, *14 (S.D.N.Y. July 20, 2005), citing *Cruz*, 202 F.3d at 565 n.1 and *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 765 (2d Cir. 1998). To prevail on a claim that harassment caused a hostile work environment in violation of Title VII (and the state and city statutes), a plaintiff must establish: "(1) that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, and (2) that a specific basis exists for imputing the objectionable conduct to the employer." *Alfano v. Costello,* 294 F.3d 365, 373 (2d Cir. 2002) (citation omitted).

A hostile-work-environment claim is "based on the cumulative effect of individual acts." *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 115 (2002). The statutes are violated "when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and

create an abusive working environment." *Id.* at 116. The alleged conduct "must be sufficiently continuous and concerted in order to be deemed pervasive." *Feingold v. New York,* 366 F.3d 138, 150 (2d Cir. 2004). "Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness." *Alfano,* 294 F.3d at 374.

Hostile-work-environment claims must also meet both objective and subjective standards. Not only must the victim "subjectively perceive [the] environment to be abusive," but the misconduct of which the plaintiff complains must also be "severe or pervasive enough to create an objectively hostile or abusive work environment." *Petrosino v. Bell Atlantic,* 385 F.3d 210, 221 (2d Cir. 2004).

Williams has not presented sufficient evidence for a jury to infer that the defendants created a hostile work environment during his employment at the bank that was based on forbidden discriminatory animus.[8] His complaint is laden with allegations and examples of instances where he subjectively perceived his work environment to be abusive. Given his revulsion for Kong, Kong's very presence appeared to turn his work environment hostile. But although Williams subjectively perceived a hostile work environment,

---

[8] In view of this conclusion, we need not determine whether the evidence proffered by plaintiff, if credited, could demonstrate a sufficiently pervasive hostile environment, irrespective of the source of the adverse work conditions.

the evidence does not permit a finding that the alleged adverse conditions were triggered by animus to his sexual orientation or perceived disability. As we have noted, all of the proffered evidence appears to reflect hostility rooted in the personality conflict in which Williams and Kong were engaged and which Williams himself acknowledged in an e-mail to Gary Ford in 2001. (CW Ex. Y). Moreover, the record evidences that Kong was antagonistic to most of those he supervised, which eventually resulted in his being issued a warning. That pattern also underscores the notion that Kong was not singling out Williams for harsh treatment based on his status. This lack of evidence of illegal animus is fatal to Williams's hostile-environment claim. *See Petrosino,* 385 F.3d at 221, 223 (quoting *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122 (2d Cir. 2003); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); and *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (cases which hold that, to establish a hostile work environment, plaintiff must show, *inter alia,* that the workplace was "permeated with *discriminatory* intimidation, ridicule and insult" that was severe or pervasive enough to alter the conditions of the work environment) (emphasis added)); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) (reiterating that conduct complained of in hostile-work-environment claim must have been prompted by victim's status). Because Williams has not presented evidence from which a jury could find an objective level of hostility based on such animus, we recommend that this claim be dismissed.

D. Retaliation

Williams contends that Kong retaliated against him for "whistle blowing" Kong's actions to personnel and higher management (Compl. ¶ 114). He also avers that Kong engaged in "post-termination retaliation and prevented Plaintiff from obtaining re-employment on account of Plaintiff's sexual orientation and perceived disability." (Compl. ¶ 175). In addition, he asserts that the bank retaliated – apparently against him – by "packaging out" John Freund subsequent to the defendants being served with the initial complaint. (Compl. ¶¶ 80, 139).

Both the NYSHRL and the NYCHRL prohibit an employer from retaliating against an employee who opposes allegedly unlawful employment practices or assists in any investigation of such practices. *See* N.Y. Exec. Law §§ 296(1)(a), 296(7), N.Y.C. Admin. Law § 8-107(7). Courts apply the *McDonnell Douglas* burden-shifting approach to analyze claims of retaliation. *See Terry v. Ashcroft,* 336 F.3d 128, 141 (2d Cir. 2003). "However, before any burden-shifting may be performed, a plaintiff must first demonstrate a *prima facie* case for retaliation." *Belardo v. Con-Way Transp. Servs., Inc.,* 2005 WL 885016, *7 (E.D.N.Y. Mar. 28, 2005). "In order to establish a *prima facie* case . . . , an employee must show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." *Feingold,* 366 F.3d at 156. "For a plaintiff's conduct to constitute

participation in a protected activity, it is enough that he has made 'informal protests of discrimination, including making complaints to management.'" *Palomo,* 2005 WL 1683586 at *17 (quoting *Gregory v. Daly,* 243 F.3d 687, 700-01 (2d Cir. 2001)). Once the plaintiff has made out his *prima facie* case, the defendants must articulate a legitimate and nondiscriminatory or non-retaliatory reason for their action. *See McDonnell Douglas,* 411 U.S. at 802-03. Then the burden shifts back to plaintiff, who must produce evidence sufficient to raise an issue of fact as to whether the defendants' justification was merely a pretext for discrimination or retaliation. *See Quinn,* 159 F.3d at 769.

Williams cannot make out a *prima facie* case of retaliation. By his own admission, he never complained to any bank official – with the exception of Prescod in 1998 – that he felt Kong's mistreatment of him was based in discriminatory animus. (Tr. #1: 134; Tr. #2: 87-88, 90-91, 159). Thus, he did not engage in protected activity known to the defendants. They were aware he was complaining about Kong, but not that he was complaining about discriminatory treatment. Even his exchange with Prescod is equivocal. When she asked him directly whether Kong was "anti-gay," Williams responded, "I don't know, but it is a concern of mine." (Compl. ¶ 119). Even assuming that the comment to Prescod qualified as "protected activity," Williams cannot show any nexus between that complaint and his termination. "Retaliatory intent may be inferred from an adverse employment

action that follows closely on the heels of the protected activity. By the same token, when no other evidence of a causal connection exists, a lack of temporal proximity can defeat a claim of retaliation." *Thomas,* 2004 WL 1962074, *18 (citations omitted). The complaint to Prescod was made years before Williams was terminated, which defeats the causal connection required to make out a *prima facie* case.

Williams also provides no factual support for his claim that Kong engaged in post-termination retaliation. He does not clarify what behaviors he objects to – *i.e.*, whether he is even asserting that Kong may have provided negative job references once he left the bank – and he offers no competent evidence of such possible misconduct. He also does not explain how the defendants could have retaliated against him by "packaging out" Freund.

Williams's allegations do not raise a genuine issue of material fact as to whether any pre- or post-termination retaliation took place. Accordingly, he cannot make out a *prima facie* case of retaliation, whether in the form of his termination or negative employment references provided after his termination.

E. Intentional Infliction of Emotional Distress

Williams asserts that Kong's "hostile verbal and hostile nonverbal communication," his "interfering actions" and "desire to control rather than manage the Plaintiff," and the range of behaviors that

Williams has collected under the rubric "Workplace Bullying" constituted intentional infliction of emotional distress. (Compl. ¶ 51)

Under New York law, a claim for intentional infliction of emotional distress requires a showing of: "(1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Conboy v. AT&T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Howell v. New York Post*, 81 N.Y.2d 115, 122, 596 N.Y.S.2d 350, 353 (1993). "New York courts are exceedingly wary of claims for intentional infliction of emotional distress in the employment context because of their reluctance to allow plaintiffs to avoid the consequences of the employment-at-will doctrine by bringing a wrongful discharge claim under a different name." *Mariani v. Consolidated Edison Co.*, 982 F.Supp. 267, 275 (S.D.N.Y. 1997), *aff'd*, 172 F.3d 38 (2d Cir. 1998). "The rare instances where the New York courts have found the complaint sufficient to state an [intentional infliction of emotional distress] claim in the employment context generally involve allegations of more significant battery, or improper physical contact."

Gilani v. Nat'l Ass'n of Secs. Dealers, Inc., 1997 WL 473383 at *14 (S.D.N.Y. Aug. 19, 1997).

Against this high standard, Williams utterly fails to raise a genuine issue of material fact as to whether defendants intentionally caused him emotional distress. Williams's evidence that Kong once called him Christine and told him that arguing with him was like arguing with his wife, and that Kong persistently bullied him (behaviors that did not rise to the level of battery), simply does not rise to the level of "extreme and outrageous conduct" that would "justify [his] intentional infliction of emotional distress claim." *Daniels v. Health Ins. Plan of Greater New York*, 2005 WL 1138492, *3 (S.D.N.Y. May 12, 2005) (citing *Benjamin v. N.Y. City Dept of Health*, 2002 WL 485731, *9 (S.D.N.Y. Mar. 29, 2002) (denying plaintiff's claim, which was based on allegations of "disparate treatment, humiliation, and insults" at the workplace); *Lydeatte v. Bronx Overall Econ. Dev. Corp.*, 2001 U.S. Dist. LEXIS 1670 at *4-*7 (S.D.N.Y. Feb. 22, 2001) (plaintiff claimed she had been harassed, denied benefits received by her Hispanic coworkers, wrongfully terminated, and retaliated against by her employer; the court held that while plaintiff might have an employment-discrimination claim, the conduct alleged was insufficient to state a claim for intentional infliction of emotional distress).

Moreover, Kong's statements and behavior fall outside the one-year statute of limitations for intentional-infliction-of-emotional-distress claims. *See Greene v. Trustees of Columbia Univ.*, 234 F.Supp.2d 368, 382

(S.D.N.Y. 2002). Williams originally filed his suit on May 2, 2002 and thus he is time-barred from complaining about any conduct that occurred prior to May 2, 2001. As defendants point out, "with the exception of the termination of employment, all of Plaintiff's allegations relate to events that took place prior to May 2, 2001" and are thus untimely. (Defts' Brief at 26). As for plaintiff's termination, it is not sufficient to raise a genuine issue of material fact in support of an intentional-infliction-of-emotional-distress claim. *See Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 293, 303, 461 N.Y.S.2d 232, 233, 236 (1983) (finding that plaintiff's allegations that he was transferred and demoted for reporting fraud, coerced to leave by being told that he would never be allowed to advance, discharged and ordered to leave immediately after reporting other alleged in-house illegal conduct, and forcibly and publicly escorted from the building by guards when he returned the next day to pick up his belongings, fell "far short" of the "strict standard" for outrageous behavior). Accordingly, this claim does not survive summary judgment.

F. Negligent Infliction of Emotional Distress

Williams asserts that the bank, and the individual defendants other than Kong, inflicted "emotional duress" on him by "acting as aider and abettor, jointly and severally by ignoring Plaintiff's complaints, the complaints of others, their own existing policies and procedures," and that they thereby enabled and sanctioned Kong's "previously listed psychologically

abusive workplace bullying tactics." (Compl. ¶ 184). When asked at his deposition to specify the facts underlying this claim, Williams basically repeated his charges: "They never did anything to solve the problem. I was never moved and put on to another team. They didn't seem to discipline Raymond Kong in any way. I don't think they took any of my allegations seriously." (Tr. #2: 188).

Under New York law, a plaintiff may establish a claim for negligent infliction of emotional distress in one of two ways: "(1) the 'bystander' theory; or (2) the 'direct duty theory.'" *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000) (quoting *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996)). Under the bystander (or zone-of-danger) theory, which is clearly inapplicable in this case,

> a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence.

Bovsun v. Sanperi, 61 N.Y.2d 219, 223-24, 473 N.Y.S. 2d 357, 358 (1984). Under the 'direct duty' theory, a plaintiff suffers emotional distress caused by "defendant's breach of a duty which unreasonably endangered [plaintiff's] own physical safety." *Mortise*, 102

F.3d at 696. Such a claim can only be upheld if the defendant owes a "direct duty" to the plaintiff that "could give rise to a special obligation to avoid negligently causing [him] emotional distress." *Druschke v. Banana Republic, Inc.*, 359 F.Supp.2d 308, 315 (S.D.N.Y. 2005), citing *Mortise*, 102 F.3d at 696. As an example of circumstances in which negligent infliction of emotional distress claims were not viable, the *Druschke* court cited *Kelly v. Chase Manhattan Bank*, 717 F.Supp. 227, 235 (S.D.N.Y. 1989), which dismissed a claim for negligent infliction of emotional distress made by a discharged employee against her employer, concluding that "although the employer may have owed the employee other duties, such as the duty to act honestly and in good faith in its employment practices, it would not be liable for negligent infliction of emotional distress because it did not owe the plaintiff employee a special duty to avoid causing emotional distress." 359 F.Supp.2d at 315. Here, Williams's physical safety was not unreasonably endangered by the defendants' negligence, nor did the defendant bank owe him a special duty.

Moreover, as defendants have asserted, "In New York, recovery for accidental injuries arising out of and in the course of employment, including injuries caused by an employer's negligence, is governed by the Workers' Compensation Law." *Johns v. The Home Depot USA., Inc.*, 2005 WL 545210, *8 (Mar. 8, 2005) (citation omitted). Under New York's Workers' Compensation Law, "psychological or nervous injury precipitated by psychic trauma is compensable to the

same extent as physical injury." *Id.* (quoting *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 510, 369 N.Y.S.2d 637, 641 (1975)). Since Williams alleges psychological injuries, the defendants' allegedly negligent actions that caused his emotional distress are governed by Workers' Compensation. If Williams's claim was meritorious, he could recover under that statute, and thus he may not recover in this lawsuit. *See* N.Y. Work. Comp. Law § 11.

G. Defamation Claims

Williams asserts a libel claim based on John Vega's statement in his January 16, 2002 letter that "there is no evidence of discriminatory animus. Any claims to the contrary are false." According to plaintiff, Vega effectively called him a liar in writing. He also avers that Kong libeled him in his 1998 review. (Compl. ¶¶ 124, 224; Tr. #2: 167). In addition, he claims that Kong slandered him "to at least one interviewer for a transfer position" in May-June 2000. (Compl. ¶ 226; Tr. #2: 172-73).

Both versions of these claims are time-barred. Under New York law, defamation claims (slander and libel) are subject to a one-year statute of limitations. *See Solas v. Jones*, 2005 WL 525444, *2 (S.D.N.Y. Mar. 7, 2005) (citing N.Y. C.P.L.R. § 215(3)). "The statute of limitations begins to run from the date that the defamatory statement is published." *Id.* Accordingly, Williams may not recover on his claim that Kong libeled him in his 1998 review, or that Kong

slandered him to an interviewer in May-June 2000, because both dates fall outside of the one year limitations period preceding the filing of his initial complaint in May 2002.

Apart from their untimeliness, these claims are plainly baseless. "A claim for defamation requires a showing that the defendant committed either libel or slander." *Campbell v. Kane, Kessler, P.C.*, 2004 WL 1234048, *6 (S.D.N.Y. June 2, 2004). Libel is defined as a "publication, expressed in printing or writing . . . concerning a living person which is false and tends to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy, or shame." *Id.* (citation omitted). *Accord Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 1076, 659 N.Y.S.2d 836, 837 (1997). On the other hand, slander "constitutes an injury to a person's reputation or good name by malicious or scandalous words." *Campbell*, 2004 WL 1234048 at *6 (citation omitted).

To recover on an action for libel under New York law, a claimant must establish five elements: "(1) a written defamatory statement of fact concerning the claimant, (2) publication to a third party, (3) fault (either negligence or actual malice depending on the status of the libeled party), (4) falsity of the defamatory statement, and (5) special damages or per se actionability defamatory on its face," *Johns*, 2005 WL 545210, at *9 (citing *Celle v. Filipino Reporter Enter., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000)). Williams testified that, to his knowledge, Vega did not share his letter to Williams's attorney with anyone else.

(Tr. #2: 167). Williams's attorney shared it with him, and he forwarded it to the Secretary of Labor and showed it to other prospective attorneys. *Id.*

Under New York law, "publication occurs when libelous words are read 'by someone other than the person libeled and the person making the charges.'" *Solas,* 2005 WL 525444 at *3 (quoting *Fedrizzi v. Washingtonville Cent. Sch. Dist.*, 204 A.D.2d 267, 268, 611 N.Y.S.2d 584, 585 (2d Dep't 1994)). "When a plaintiff engages an attorney to correspond with another party in regards to a 'special matter' between the parties, however, a private letter answering plaintiff's attorneys does not constitute publication in a libel action under New York law." *Solas,* 2005 WL 525444 at *3 (quotation omitted). Thus, Vega's letter was not "published" for the purpose of a libel claim because he wrote it in direct response to a letter from Williams's attorney, and plaintiff may not recover on this claim.

Moreover, Vega is protected by a qualified privilege. "A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty." *Santavicca v. City of Yonkers,* 132 A.D.2d 656, 657, 518 N.Y.S.2d 29, 31 (2d Dep't 1987). Communications are regarded as privileged where the occasion and the relation of the parties afford reasonable grounds for supposing an innocent motive for giving the information. *See Anas v. Brown,* 269 A.D.2d 761, 762, 702

N.Y.S.2d 732, 734 (4th Dep't 2002). In addition, "to the extent that statements are made about employees in an employment context, they qualify as privileged since such statements were made by one person to another upon a subject in which they have a common interest." *Hawkins v. City of New York,* 2005 WL 1861855, *19 (S.D.N.Y. Aug. 4, 2005) (citing *Williams v. Varig Brazilian Airlines,* 169 A.D.2d 434, 438, 564 N.Y.S.2d 328, 331 (1st Dep't 1991)). "The shield of privilege is pierced only by a plaintiff's showing of actual malice." *Hawkins,* 2005 WL 1861855 at *19 (citing, *Hollander v. Cayton,* 145 A.D.2d 605, 636, 536 N.Y.S.2d 790, 792 (2d Dep't 1988)). "To overcome a qualified privilege, it is plaintiff's burden to show actual malice." *Id.* (quoting *Buckley v. Litman,* 57 N.Y.2d 516, 521, 457 N.Y.S.2d 221, 223 (1982). Williams has not offered any evidence suggesting that Vega was motivated by malice in making his statement, and thus this claim fails as well.

CONCLUSION

For the reasons stated, we recommend that defendants' motion for summary judgment be granted.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of

the Honorable George B. Daniels, Room 410, 40 Foley Square, and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York 10007. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985); *Small v. Secretary, of Health and Human Services,* 892 F.2d 15, 16 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York
August 19, 2005

Respectfully submitted,

/s/ [Illegible]
MICHAEL H. DOLINGER
UNITED STATES
MAGISTRATE JUDGE

Copies of the foregoing Report and Recommendation have been mailed this date to:

Mr. Christian L. Williams
268 Barrow Street, GRDN
Jersey City, New Jersey 07302-4026

Stacey L. Beecher, Esq.
Frederic L. Lieberman, Esq.
J.P. Morgan Chase Legal Department
J.P. Morgan Chase Bank
One Chase Manhattan Plaza, 26th Floor
New York, New York 10081